COVINGTON

COVINGTON & BURLING LLP

BEIJING SAN FRANCISCO
BRUSSELS SEOUL
LONDON SHANGHAI
NEW YORK SILICON VALLEY
SAN DIEGO WASHINGTON

ROBERT K. KELNER
1201 PENNSYLVANIA AVENUE, NW
WASHINGTON, DC 20004-2401
T 202.662.5503
F 202.778.5503
rkelner@cov.com

May 1, 2013

BY HAND DELIVERY

Jeff S. Jordan
Supervisory Attorney
Complaints Examination &
Legal Administration
Federal Election Commission
999 E Street, NW
Washington, DC 20004

Re: MUR 6726 (Chevron Corporation, Chevron U.S.A. Inc.)

Dear Mr. Jordan:

We write on behalf of our clients, Chevron Corporation and Chevron U.S.A. Inc., in response to the complaint filed by Public Citizen, Friends of the Earth, Oil Change International, and Greenpeace USA. The complaint alleges that Chevron Corporation and/or Chevron U.S.A. Inc. violated section 441c of the Federal Election Campaign Act of 1971 ("FECA") by making a contribution to the Congressional Leadership Fund as a federal contractor.

The complaint lacks factual and legal support to meet the minimum thresholds necessary to allege a violation of the law. Chevron Corporation was not a federal contractor at the time it made a contribution to the Congressional Leadership Fund. Even if it had been, it could not constitutionally have been prohibited from contributing to a Super PAC. For these reasons, the Commission should find there is no reason to believe that a violation of the law has occurred and should dismiss the complaint with no further action.

SUMMARY OF ARGUMENT

In October of 2012, Chevron Corporation made a $2,500,000 contribution to the Congressional Leadership Fund. The Congressional Leadership Fund is an independent expenditure-only federal political committee registered with the Federal Election Commission ("FEC") (Committee ID No. C00504530), a type of entity often referred to as a "Super PAC." In light of the United States Supreme Court's decision in *Citizens United v. FEC*, the United States Court of Appeals for the District of Columbia Circuit's decision in *SpeechNow v. FEC*, and the FEC Advisory Opinions in *Commonsense Ten* and *Club for Growth*, it is well settled that a corporation may make a contribution to a Super PAC without limitation as to amount.

Chevron Corporation is a Delaware corporation publicly traded on the New York Stock Exchange. As a general matter, Chevron Corporation does not sell any goods or services to anyone. Instead, it owns shares in, allocates capital to, reviews financial and performance goals for, monitors the performance of, and provides general policy guidelines to numerous global subsidiaries and affiliates, which are separate holding or operating companies, under the direction and control of their own management, engaged in all aspects of worldwide energy operations. As a consequence, Chevron Corporation's primary assets consist of the stock of other companies, and its income is primarily derived from the dividends of those companies.

Chevron Corporation holds 100% of the stock of Chevron Investments Inc. Chevron Investments Inc. in turn owns the stock of other companies, including Texaco Inc. Texaco Inc., in turn, owns the stock of other companies, including Chevron U.S.A. Holdings Inc. Chevron U.S.A. Holdings Inc., in turn, owns 100% of the shares of Chevron U.S.A. Inc.

Chevron U.S.A. Inc. is actively engaged in virtually all branches of the petroleum industry as well as mineral, geothermal, and other activities, and derives a relatively insignificant amount of its revenue from contracts it either directly has with the federal government, or that one of its subsidiaries, or a subsidiary of a subsidiary, may have from time to time with the federal government. Chevron Corporation derives dividend revenues from subsidiary companies other than Chevron U.S.A. Inc. in excess of the sum it contributed to the Congressional Leadership Fund. In addition, Chevron Corporation's revenues generated by its subsidiary entities in 2012 from private sector sources (i.e., sources other than federal contracts) dwarfed the amount contributed to the Congressional Leadership Fund.

As detailed below, while the USASpending.gov website is the sole basis for the complainants' allegation that Chevron Corporation was a federal contractor, that database does not always provide an accurate record of the specific corporate entity with which the federal government has entered into an agreement. For example, if the operator of a mini-mart and gas station that has been licensed to sell gas under the name "Chevron Mini-Mart" sells products to the federal government, the USASpending.gov database may record that as a contract between "Chevron Corporation" and the federal government, even though the agreement in fact is not with Chevron Corporation or any of its subsidiary entities.

Nor are the "contracts" listed on the USASpending.gov database limited to what would generally be considered contracts. For example, if a business enters into a contract with the federal government for the delivery of a product over time, such as lubrication fluids, and the government places three delivery orders under that agreement, the database may record there being four contracts: the original agreement and the three requests for delivery.

Based upon a review of the information provided with the complaint and amended complaint, information on the USASpending.gov website, and an independent search of Chevron Corporation's records, Chevron Corporation has found no evidence that it had any contractual

agreement with the federal government in October of 2012 when it contributed to the Congressional Leadership Fund, nor that it was seeking to become a federal contractor.

Lastly, even if Chevron Corporation had been or was seeking to become a federal contractor at the time it contributed to the Congressional Leadership Fund, the United States Supreme Court's decision in *Citizens United* and subsequent decisional law makes clear that the courts have narrowed the legitimate state interest here to one of preventing *quid pro quo*-type corruption, or the appearance thereof, and concluded that such corruption is not present in the context of independent expenditures. The facts here highlight the attenuated nature of any claim of *quid pro quo* corruption. Few would argue that a Democratic President's administration would award government contracts in return for a contractor contributing to a Super PAC that supports House Republicans. The Commission should avoid this constitutional concern by interpreting section 441c's prohibition on federal contractors making contributions to various entities—such as a "committee" or other "person"—to exclude contributions to Super PACs.

For all of these reasons, no violation of law occurred here, and we respectfully request that the agency dismiss this matter without further action.

ARGUMENT

I. No Violation of Law Occurred Because Chevron Corporation Was Not a Federal Contractor at the Time it Contributed to the Congressional Leadership Fund

Chevron Corporation was the corporate entity that made the contribution to the Congressional Leadership Fund that is the subject of the complaint. Because Chevron Corporation was not a federal contractor when it made the contribution, there was no violation.

A. The Prohibition on Federal Contractor Contributions is Limited in Scope

1. The Statute and Regulations Limit the Prohibition in Scope and Time

Section 441c of FECA prohibits, among other things, any person "who enters into any contract" with the federal government that is to be paid with appropriated funds from "directly or indirectly" making "any contribution . . . to any political party, committee, or candidate for public office or to any person for any political purpose or use."[1] The only person subject to section 441c is a "federal contractor," defined as a non-federal party who enters into a contract with the federal government for the "rendition of personal services," to "[f]urnish[] any material,

[1] 2 U.S.C. § 441c(a)(1); *see also* 11 C.F.R. § 115.2.

supplies or equipment," or to "[s]ell any land or buildings" if appropriated funds are used to pay for performance of the contract.[2]

The prohibition of section 441c is also limited in time, and only applies between the "earlier of the commencement of negotiations or when requests for proposals [("RFP")] are sent out," and "the later of" either the "completion of performance" or the "termination of negotiations."[3] It does not apply to a person just because the person has in the past been, or may in the future be, a party to a contract with the federal government. Consequently, even a person who regularly contracts with the federal government would not be covered by section 441c if that person were to make a contribution after the completion of a contract or before the commencement of negotiations or an RFP for a new contract.

By its terms, section 441c also does not apply to many categories of individuals and entities, notwithstanding the control they may have over, the potential benefit they may derive from, or their interest in pursuing federal contracts. Persons expressly exempted from the prohibition of section 441c by the statute or Commission regulations include: (1) third party beneficiaries of a federal contract;[4] (2) the separate segregated fund of a federal contractor;[5] (3) shareholders of a federal contractor;[6] (4) officers and employees of a federal contractor;[7] and (5) partners, if the federal contractor is a partnership.[8] These persons could derive much, if not all, of their income or revenue from an entity that is a federal contractor, but by statute and regulation, they are not *themselves* federal contractors subject to section 441c's contribution prohibition.

---

[2] *See* 2 U.S.C. §441c(a); *id.* § 431(11) (defining "person"); 11 C.F.R. § 115.1(a) (defining "federal contractor").

[3] 2 U.S.C. § 441c; 11 C.F.R. § 115.1(b) (modifying the statutory provision by adding the clause "when the requests for proposals are sent out" as a trigger condition for the beginning of the period of section 441c applicability).

[4] 11 C.F.R. § 115.1(d) ("The third party beneficiary of a Federal contract is not subject to the prohibitions of this part.").

[5] 2 U.S.C. § 441c(b); 11 C.F.R. § 115.3.

[6] 11 C.F.R. § 115.6.

[7] *Id.*; *id.* § 115.4(c).

[8] *Id.* §115.4(b).

2. The FEC's Application of the Federal Contractor Ban

Although there are few instances where section 441c has been applied to specific facts, the FEC generally holds that it is the entity that contracts with the federal government that is barred, and not a parent entity that is a separate and distinct legal entity from the federal contractor subsidiary if it had sufficient funds from a source other than the federal contractor subsidiary to make the contribution in question. This distinction between a parent entity that could give and a subsidiary that could not has also been followed when a federal contractor is owned and controlled by an LLC[9] or an Indian tribe, even when the tribe's federal contracting entity could have been organized as, but was "not a corporation and thus [was] not formally separate from the Nation."[10]

B. The Complaint Lacks Sufficient Factual Support to Allege that the Contribution Was Made by a Federal Contractor

The complaint lacks a foundation in fact. The original complaint alleges that Chevron U.S.A. Inc. made a contribution to the Congressional Leadership Fund in October 2012 in violation of section 441c. Recognizing that the original premise of the complaint that Chevron U.S.A. Inc. was the contributing entity may have been wrong, the complainants filed an addendum to the complaint on March 11, 2013, included data from the USASpending.gov website, and stated that "it appears based on data from [USASpending.gov] that Chevron Corporation itself had government contracts in 2012," noting that "a contribution would be illegal if any of those contracts was either in force or being negotiated when the contribution was made." As will be shown below, these allegations do not have a sufficient basis in fact to support a finding that there is a reason to believe a violation of section 441c has occurred.

---

[9] *See, e.g.*, FEC, Advisory Op. No. 1998-11, at 5 (Sept. 3, 1998) ("Patriot Holdings") (stating that "the prohibitions of 2 U.S.C. § 441c do not apply" to an LLC parent of two federal contractor subsidiaries because the LLC was a "separate and distinct legal entity from its Federal contractor subsidiaries"); *see also* MUR 6403 ("Alaskans Standing Together"), First General Counsel's Report, at 15 (stating that "[i]n the case of a parent company contributor, if it can demonstrate that it is, in fact, a separate and distinct legal entity from its government contracting subsidiaries, and that it had sufficient funds to make the contribution from non-subsidiary income, then the prohibition on contributions by government contractors would not extend to the parent company.").

[10] *See* FEC, Advisory Op. No. 1999-32 (Jan. 28, 2000) ("Tohono O'odham Nation").

1. The Contribution to the Congressional Leadership Fund Was Made By Chevron Corporation, Not Chevron U.S.A. Inc.

The making of an impermissible contribution is an absolute prerequisite to establishing a violation of section 441c. The sole basis for the complainants' allegation is a contribution to the Congressional Leadership Fund in October 2012. Chevron Corporation was the donor, not Chevron U.S.A. Inc. Consequently, although Chevron U.S.A. Inc. or its subsidiaries may have at times engaged in contracts with the federal government, it cannot have violated section 441c because it made no contribution.

In October 2012, Chevron Corporation executives decided to contribute to the Congressional Leadership Fund.[11] The Policy, Government and Public Affairs ("PGPA") Corporate Department of Chevron Corporation instructed Finance Shared Services to prepare a check on behalf of Chevron Corporation to the Congressional Leadership Fund.[12] Finance Shared Services did so and charged that payment to Chevron Corporation.[13]

Chevron Corporation, and not Chevron U.S.A. Inc., made the contribution and the complainants' allegation as to Chevron U.S.A. Inc. therefore lacks the support necessary to justify further review by the Commission. The complaint as to Chevron Corporation must also be dismissed, for the reasons described below.

2. The Complainants Failed to Show that Chevron Corporation Was a Federal Contractor at the Time of the Contribution

Section 441c only applies to those who are federal contractors under the law at the time of the contribution. The complaint fails to provide facts demonstrating that Chevron Corporation was a federal contractor at the time of its contribution in October 2012.

The sole basis the complainants provide for the assertion that Chevron Corporation may have been a federal contractor is a printout of the USASpending.gov database. Yet the database upon which the complainants rely provides at times confusing and inaccurate information regarding federal contracts.

While querying the USASpending.gov database for "Chevron Corporation" results in multiple entries, a closer review shows that: (a) many of the entries in the database involve

---

[11] Declaration of Kari H. Endries, ¶ 8.

[12] *Id.*

[13] Declaration of Thomas G. Hoffman, ¶ 3 & Ex. A.

companies other than Chevron Corporation; (b) of the remaining entries, most are agreements—such as purchase orders or delivery orders—to implement sixteen underlying contracts; (c) many of these sixteen underlying contracts are dated well beyond the temporal limits of the law, with some over a decade old, and none are still active; and (d) many of the contracts do not list the true vendor.[14] Chevron has located nine of the underlying contracts, of which five name a Chevron subsidiary rather than Chevron Corporation as the contracting party.[15] The other four erroneously name Chevron Corporation, when the goods or services were actually supplied by a subsidiary of Chevron Corporation under contracts which were fully performed prior to the October 2012 contribution.[16]

The final seven are older and could not be located, but the database contains enough information about the company, product, service, or other information that it can be reasonably ascertained that, if these contracts listed Chevron Corporation, it would have been by mistake because the goods and services described in the database are provided by Chevron Corporation subsidiaries, and not by Chevron Corporation itself.[17] Moreover, the database contains enough information about the period of performance under these seven contracts that it can be reasonably ascertained that performance had been completed prior to October 2012.[18]

a) Unrelated companies account for numerous entries

Searching the database for "Chevron Corporation" results in numerous entries associated with companies other than Chevron Corporation. A recent search resulted in over fifty-one such entries.[19] For example, one of the entries that appears when querying the database for "Chevron Corporation" is a contract with Parman Energy Corporation, not Chevron Corporation.[20] Parman Energy is a reseller of various Chevron products such as lubricants and fuel oils, but is not a subsidiary of Chevron Corporation.[21]

---

[14] Declaration of Kari H. Endries, ¶¶ 11, 17.

[15] *Id.* at ¶¶ 16, 18-22.

[16] *Id.* at ¶¶ 16, 23-24.

[17] *Id.* at ¶¶ 16, 25-31.

[18] *Id.* at ¶ 17.

[19] *Id.* at ¶¶ 11, 13-14.

[20] *Id.* at ¶ 13 & Ex. A.

[21] *Id.*

A number of the entries appear solely because the word "Chevron" is listed somewhere in the entry description. For example, two supposedly responsive results include entries associated with a loan from the Small Business Administration to "TSV Corp dba Vick's Chevron Food Mart" and a contract with "Aramark Uniform and Career Apparel Incorporated."[22] It appears that the former was listed because "Chevron" appears in the doing-business-as name of TSV Corp; the latter apparently involves a contract for the supply of military badges and insignia, including "Corporal Chevrons – Navy with Black TRIM."[23] Such entries artificially inflate the number of entries apparently associated with a contract with a Chevron entity. These entries do not relate to a contract with a Chevron entity, let alone Chevron Corporation, and obviously cannot support a violation of section 441c.

b) The database is inflated with purchase and delivery orders

The database is also misleading because once entries in which a company other than Chevron Corporation was listed as the vendor have been eliminated, almost all of the remaining entries (73 out of the remaining 89) are no more than execution documents (such as purchase orders, delivery orders, or modifications to the terms of the agreement) for the 16 underlying contracts.[24] The inclusion of such documents also artificially inflates the number of entries that purport to list a contract between the federal government and Chevron Corporation.

c) The database lists contracts dating back to 2000, well beyond the temporal limits of the law

As noted, the database includes entries for expired contracts dating back to 2000.[25] Because the database provides limited information and includes entries for contracts that are over a decade old, it proved difficult and resource intensive to attempt to locate the underlying contracts, and some of the older contracts could not be located. Further, some of the entries describe transactions for which no formal contract was likely ever entered (e.g., a $13 fuel purchase made on a government-issued purchase card in 2007).[26] Nonetheless, we have attempted to identify every entry listed in the database to provide the Commission with a full record that demonstrates that no further action is warranted.

---

[22] *Id.* at ¶ 14 & Ex. B.

[23] *Id.*

[24] *Id.* at ¶ 15.

[25] *Id.*

[26] *See, e.g., id.* at ¶ 27.

d) Many of the entries do not list the true vendor

Even more troubling than the fact that a search for "Chevron Corporation" results in entries in which the listed recipient is a company other than Chevron Corporation, or that many of the entries list contract execution documents rather than the contracts themselves, is the fact that many of the database entries list the *wrong vendor*.

Out of all the items listed in the database as responsive to "Chevron Corporation," there are only sixteen entries that represent an underlying agreement—as opposed to an executing document such as a delivery order—in which Chevron Corporation is listed as the recipient.[27] Due to the passage of time and the limited information provided in the database, we have not been able to locate some of the oldest contracts dating back to between 2000 and 2008. We have, however, located many of the underlying contracts and every one either correctly identified a Chevron Corporation subsidiary as the party, but incorrectly listed Chevron Corporation in the database, or erroneously listed Chevron Corporation in place of the subsidiary performing under the contract in contract documentation.[28] The following discussion summarizes these sixteen entries.

Five of the contracts that were located were agreements in which the party was expressly listed as one of Chevron Corporation's subsidiaries: Chevron U.S.A. Inc.; Chevron Products Company (a division of Chevron U.S.A. Inc.); Chevron U.S.A. Products Company (the former name of Chevron Products Company); or Chevron Global Aviation (formerly a division of Chevron U.S.A. Inc., but which has since been dissolved).[29]

One of these five contracts was a contract with Chevron Products Company to provide lubricants to the Department of Defense ("DoD").[30] We also located documentation for three subsequent DoD lubricants contracts, which were the subject of extended efforts by Chevron Products Company employees to correct the erroneous use of "Chevron Corporation" in contract documentation.[31] This error was ultimately corrected with the issuance of a contract in effect beginning April 1, 2012, in which the contracting entity was again properly listed as Chevron Products Company.[32]

---

[27] *Id.* at ¶ 15.

[28] *Id.* at ¶ 15-16.

[29] *Id.* at ¶¶ 18-22.

[30] *Id.* at ¶ 22.

[31] *Id.* at ¶ 23 & Exs. C, D, E.

[32] *Id.*

The last of the nine contracts that were located was not a traditional contract but rather an "Order for Supplies or Services" in the amount of $4,040 issued by a government agency for geophysical data used by Union Oil Company of California, a subsidiary of Unocal Corporation,[33] in preparing a bid to submit to the agency.[34] This "Order for Supplies or Services" did not contain a signature line for the contractor to sign and no one from Chevron Corporation or any other Chevron affiliate signed the "Order."[35] Although the Bureau issued its request for the data using the name of Chevron Corporation, rather than Union Oil Company, it sought information from Unocal Corporation's subsidiary, Union Oil Company, performance was completed by providing the requested data on February 14, 2012, and the government ultimately was not invoiced for the data.[36]

Of the seven underlying contracts we were not able to locate, the limited information available in the database is inconsistent with Chevron Corporation having been the true contracting party. The following provides summarized discussion of the remaining underlying contracts that date to 2008 or earlier:

- Two "contracts" appear to have been fuel purchases with a government purchase card for which no formal contract was likely entered.[37] In light of the nature of the transactions, the transactions were likely with a division of Chevron U.S.A. Inc., or with an independently-owned Chevron-branded gasoline station.[38]

- One contract appears to have been related to two purchase orders for fuel oil by the U.S. Coast Guard in May 2008 in El Salvador.[39] While this contract could not be located, two invoices for fuel sold to the U.S. Coast Guard in May 2008 in El Salvador were located.[40] Both invoices are in the name of Chevron Caribbean Inc., which is not a division of Chevron Corporation.[41]

---

[33] Unocal Corporation is a subsidiary of Chevron Corporation.

[34] Declaration of Kari H. Endries, ¶ 24.

[35] *Id.*

[36] *Id.* & Ex. F.

[37] *Id.* at ¶¶ 25, 27.

[38] *Id.*

[39] *Id.* at ¶ 26.

[40] *Id.* & Ex. G.

[41] *Id.*

- For two additional contracts, the contract abstracts posted in the USASpending.gov database include information indicating that the vendor was not actually Chevron Corporation but was instead Chevron U.S.A. Inc. (the abstract for one shows a division of Chevron U.S.A. Inc., and the abstract for the other lists a DUNS number that corresponds to Chevron U.S.A. Inc.).[42]

- The final two contracts are dated from 2000 and 2001 and appear to have been for professional services.[43] Based on a reading of the contract abstracts posted to the USASpending.gov website, these may have been for engineering services provided to the Navy.[44] Such services could have been provided by multiple upstream or downstream subsidiaries, but would not have been provided by Chevron Corporation.[45]

e) Chevron Corporation's search did not reveal any federal contracts or contract negotiations at the time of the October 2012 contribution

Chevron Corporation is not in the business of federal contracting and consequently does not have a division, unit, or person responsible for federal contracting.[46] The organizational structure of all the Chevron entities and their subsidiaries includes over 1,600 separate subsidiaries; Chevron U.S.A. Inc. itself has over 360 subsidiaries.[47] There is no single database across all Chevron entities in which all contracts for all these entities are stored.[48]

Chevron Corporation personnel, with the assistance of employees of Chevron U.S.A. Inc., conducted an internal review undertaken over the course of six weeks in an effort to identify any contract Chevron Corporation may have had or sought with the federal government during the relevant time period.[49] These individuals contacted numerous contract administrators and individuals in multiple business units across multiple Chevron entities in an attempt to locate or

---

[42] *Id.* at ¶¶ 28-29.

[43] *Id.* at ¶¶ 30-31.

[44] *Id.*

[45] *Id.*

[46] *Id.* at ¶ 5.

[47] *Id.* at ¶ 6.

[48] *Id.*

[49] *Id.* at ¶ 10. Because Chevron U.S.A. Inc. was not the donor, a similar search was not undertaken as to that entity.

otherwise identify any such contracts including the contracts identified in the USASpending.gov database.[50]

Based upon the internal review, Chevron Corporation and Chevron U.S.A. Inc. were able to associate the vast majority of the entries in the database with a more limited number of underlying contracts. A number of the underlying contracts were located. They demonstrate that Chevron Corporation was either not the party listed on the contract documentation or that such listing was erroneous and did not reflect the real arrangement between the parties. Further, even if the Commission were to give undue weight to data entry or scrivener's errors, there is no reason to believe that any of the contracts listing Chevron Corporation as the vendor were still active in October 2012, when Chevron Corporation made a contribution to the Congressional Leadership Fund.

Nor did the internal review reveal any evidence that Chevron Corporation was in the process of negotiating, or responding to a request for proposal for, or undertaking performance pursuant to, a contract with the federal government in October 2012.[51] The results of the internal review are not surprising. Although Chevron Corporation has subsidiary entities that may enter into an agreement with the federal government that involves the sale of some good or service, Chevron Corporation is not, and was not in October 2012, in the business of federal contracting.

f) Chevron Corporation received sufficient funds from subsidiaries other than Chevron U.S.A. Inc. to have made the contribution to the Congressional Leadership Fund

Chevron Corporation owns 100% of the stock in Chevron Investments Inc., which itself owns stock in subsidiary entities, which themselves have subsidiaries.[52] Chevron Corporation derived revenue in 2012 from subsidiaries other than Chevron U.S.A. Inc. substantially greater than the sum it contributed to the Congressional Leadership Fund.[53] Based upon a review of the USASpending.gov database, Chevron Corporation believes these non-Chevron U.S.A. Inc. subsidiaries are not themselves federal contractors.[54] Thus, Chevron Corporation, a separate and distinct legal entity from Chevron U.S.A. Inc., derived sufficient funds from subsidiaries other than Chevron U.S.A. Inc. to have made the contribution to the Congressional Leadership Fund.[55]

---

[50] *Id.*

[51] *Id.* at ¶ 17.

[52] *Id.* at ¶ 6.

[53] *Id.* at ¶ 9.

[54] *Id.*

[55] *See, e.g.*, *supra* notes 9-10.

II. A Federal Contractor Cannot Constitutionally Be Prohibited From Contributing to a Super PAC

Even if Chevron Corporation had been a federal contractor for purposes of section 441c, or if Chevron U.S.A. Inc. had made the contribution to the Congressional Leadership Fund, the First Amendment protects their right to make a contribution to a Super PAC. The only legitimate state interest for the type of prohibition found in section 441c is the prevention of *quid pro quo* corruption or the appearance thereof. Since *Buckley v. Valeo*, independent political speech has had heightened constitutional protection precisely because it lacks this risk of *quid pro quo* corruption.

Section 441c can be read in a manner consistent with the First Amendment only if the statutory reference to "contribution to any . . . committee . . . or to any person" is read to exclude contributions to independent expenditure-only committees.

A. The Sole Legitimate State Interest in Restricting Political Speech is Preventing *Quid Pro Quo* Corruption

The First Amendment directs that "Congress shall make no law . . . abridging the freedom of speech."[56] The First Amendment protects speech to allow for an "'open marketplace' of ideas,"[57] and political speech is at the core of this protection.[58] The Supreme Court has made clear that when a corporation engages in political speech, it receives the full measure of constitutional protection, just the same as any other person.[59]

In *Citizens United*, the Supreme Court explained that the government has a sufficiently important interest in preventing *quid pro quo* corruption to support restrictions on direct contributions to candidates.[60] The Court held that other governmental interests once deemed a possible basis for limiting political spending, such as the "antidistortion interest" and "shareholder-protection interest," were no longer valid, however.[61]

---

[56] U.S. Const. amend. I.

[57] *Citizens United*, 130 S. Ct. 876, 906 (2010) (quoting *New York State Bd. of Elections v. Lopez Torres*, 552 U.S. 196, 208 (2008)).

[58] *See id.* at 898 (quoting *Eu v. San Francisco Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989) (quoting *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971))).

[59] *See id.* at 900 (citations omitted).

[60] *Id.* at 901-13.

[61] *See id.* at 906, 911.

B. Independent Expenditures Do Not Present a Risk of *Quid Pro Quo* Corruption

For nearly forty years, the Supreme Court has held that independent expenditures, by definition, lack the "prearrangement and coordination" that is characteristic of direct contributions, and consequently, the government's otherwise valid interest in preventing *quid pro quo* corruption is insufficient to justify restrictions on independent expenditures.[62] Put simply: "independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption."[63] The Court has not qualified this position with respect to any category of speaker.

The U.S. Court of Appeals for the District of Columbia Circuit extended the logic of *Citizens United* when it held in *SpeechNow* that a group of individuals who sought to associate together to express their shared political views solely through independent expenditures could not constitutionally be restricted as to the amount of donated funds they were permitted to receive:

> [B]ecause *Citizens United* holds that independent expenditures do not corrupt or give the appearance of corruption as a matter of law, then the government can have no anti-corruption interest in limiting contributions to independent expenditure-only organizations.[64]

Following *SpeechNow*, the Commission established a process by which an independent expenditure-only committee could be formed, acknowledging that "corporations may make unlimited independent expenditures using corporate treasury funds" and that "corporations, labor organizations and political committees also may make unlimited contributions to organizations . . . that make only independent expenditures."[65] The Commission also recognized that since case law establishes that independent expenditures do not give rise to *quid pro quo* corruption, "there is no basis to limit the amount of contributions to the [independent

---

[62] *Buckley v. Valeo*, 424 U.S. 1, 47 (1976); *see also Citizens United*, 130 S. Ct. at 908-10.

[63] *Citizens United*, 130 S. Ct. at 909.

[64] *SpeechNow v. FEC*, 599 F.3d 686, 696 (D.C. Cir. 2010).

[65] FEC, Advisory Op. No. 2010-11, at 3 (July 22, 2010) ("Commonsense Ten"); *see also* FEC, Advisory Op. No. 2010-09 (July 22, 2010) ("Club for Growth").

expenditure-only] Committee from individuals, political committees, corporations, and labor organizations."[66]

C. A Corporation's Status as a Federal Contractor Does Not Alter the Principle Established in *Citizens United*

Chevron Corporation must be accorded the same First Amendment rights as a natural person without regard to its corporate status.[67] Indeed, the Supreme Court has clarified that "[q]uite apart from the purpose or effect of regulating content," the government may not "tak[e] the right to speak from some and giv[e] it to others," as the "First Amendment protects speech and speaker, and the ideas that flow from each."[68]

In the context of independent expenditures, the Supreme Court has firmly rejected a reading of FECA that advantages or disadvantages a particular kind of speaker. Specifically, in *Citizens United*, the Court rejected a distinction between media corporations and other corporations on the basis that none exists under the First Amendment.[69] Treating federal contractors as occupying a disadvantaged position in the exercise of First Amendment rights would directly contradict this bedrock principle.

Most lower courts that have considered the validity of contractor contribution bans and similar restrictions have not done so in the context of giving to an independent expenditure-only group.[70] For example, in *Wagner v. FEC*, the United States District Court for the District of

---

[66] FEC, AO 2010-11, at 3. Here, as was often the case in the first election cycle in which Super PACs operated, the requester voluntarily restricted itself from soliciting federal contractors. *See id.* at 2.

[67] *See Citizens United*, 130 S. Ct. at 900 (citations omitted). The same would be true if the FEC were to focus its review on Chevron U.S.A. Inc. on the basis that, contrary to the evidence, Chevron U.S.A. Inc. made the contribution to the Congressional Leadership Fund.

[68] *Id.* at 899. The Court has upheld a narrow class of restrictions for speech related to governmental functions, none of which are applicable here. *See id.*

[69] *Id.* at 905-06 (citing *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 691 (1990) (Scalia, J., dissenting)).

[70] *See Ognibene v. Parkes*, 671 F.3d 174 (2d Cir. 2012) (upholding a limit in New York City on contributions by persons "doing business with the city" to candidates for certain city offices); *Green Party of Connecticut v. Garfield*, 616 F.3d 189 (2d Cir. 2010) (upholding a limit on contributions to officials and political party committees by contractors, but striking down other limits, including the ban on lobbyists contributions and a ban on solicitation by contractors and lobbyists, on First Amendment grounds); *Preston v. Leake*, 660 F.3d 726 (4th Cir. 2011) (upholding a North Carolina ban on lobbyists making direct contributions to candidates); (continued...)

Columbia upheld section 441c's contribution limits as to contributions "to candidates, parties, and their committees," but did not decide the issue as to independent expenditures.[71]

The Court in *Wagner* did, however, warn that "*SpeechNow* creates substantial doubt about the constitutionality of any limits on Super PAC contributions—*including § 441c's ban on contributions by federal contractors.*"[72] A recent Ninth Circuit decision reinforces this view by upholding the trial court's judgment rejecting a request for an injunction against the ban on federal contractors making direct contributions, while granting the injunction as to independent fundraising and spending.[73]

To the degree the FEC has considered the issue, it has been in only a cursory fashion. As complainants note, a former Commission Chair is reported to have stated in Congressional testimony that the statutory ban in 441c had survived,[74] several agency decisions note that Super PACs have often voluntarily chosen to operate as if the ban survives,[75] and in one enforcement matter, the agency concluded 441c applied to contributions to an independent expenditure committee, then exercised its discretion not to pursue the matter further.[76]

Dallman v. Ritter, 225 P.3d 610 (Colo. 2010) (striking down a ban on contractor contributions to elected officials and political parties as vague and overbroad).

[71] *Wagner v. FEC*, No. 11-1841 (JEB), 2012 WL 5378224, *1, *5, *11 (D.D.C. Nov. 2, 2012); *see also Wagner v. FEC*, 854 F. Supp.2d 83 (D.D.C. 2012) (denying a motion for a preliminary injunction as to the same issue).

[72] *Wagner*, 2012 WL 5378224 at *5 (emphasis added).

[73] *See Thalheimer v. City of San Diego*, 645 F.3d 1109 (9th Cir. 2011).

[74] *See* Ian Duncan & Matea Gold, *Federal Contractors Donate to Super PAC backing Romney*, L.A. Times (Mar. 18, 2012), http://www.latimes.com/news/nationworld/nation/la-na-contractor-politics-20120318,0,5184326.story?page=1. This, however, was not included in the Commissioner's prepared testimony. *See Opening Statement Before the Subcomm. on Elections of the Comm. on House Administration, U.S. House of Representatives*, 112th Cong. (2011) (statement of Cynthia L. Bauerly, Chair, FEC), *available at* http://cha.house.gov/sites/republicans.cha.house.gov/files/documents/hearing_docs/111103_testimony_bauerly.pdf.

[75] *See, e.g.*, FEC, AO 2010-11, Request by Commonsense Ten, at 3; FEC Advisory Op. No. 2010-20 (Sept. 24, 2010) ("National Defense PAC"), Request by National Defense PAC, at 2.

[76] *See* MUR 6403 ("Alaskans Standing Together"), Factual and Legal Analysis, at 9.

Even if there could be a legitimate concern that a direct contribution by a federal contractor to a federal official would raise the specter of *quid pro quo* corruption,[77] that is not *this* case. This case concerns independent expenditures and contributions to support independent expenditures.

D. Chevron Corporation's Contribution to the Congressional Leadership Fund Does Not Raise the Threat of *Quid Pro Quo* Corruption

Even if one wanted to argue that the prohibition in 441c should apply to contributions to an independent expenditure-only committee, the facts in this matter provide a particularly poor context in which to advance the argument. There are four features to this contribution that make the risk of *quid pro quo* corruption here particularly low: (a) the Congressional Leadership Fund supports an array of candidates, making any one legislator potentially less beholden to donors than if the contribution were to a single-candidate super PAC;[78] (b) this Super PAC supports candidates in congressional races, rather than the election of an individual to an office that controls federal contracting; (c) this contribution supported the political party that competes with the party that currently controls federal contracting; and (d) federal contracts make up a minuscule portion of the revenue of Chevron entities.

Put simply, any argument that Chevron Corporation could somehow influence specific federal contracts managed by specific federal agency officials through a defined contracting process within the Executive Branch by making a contribution to an independent expenditure-only committee that supports a broad group of House Republicans would be strained and speculative, to say the least.

---

[77] *See, e.g.*, *Wagner*, 854 F. Supp. 2d 83 (providing historical context for the federal contractor prohibition and examining the risk of corruption in contracting).

[78] *See* Congressional Leadership Fund, *About*, *available at* http://www.congressionalleadershipfund.org/about/ (last visited Apr. 17, 2013). Even the complainants argue there is a reduced risk of *quid pro quo* corruption when the Super PAC advocates for many candidates as opposed to a single candidate. *See* Public Citizen, *Super Connected*, at 18, 34 (2012) (arguing that groups focused on a *single candidate* are "virtually equivalent" to a direct candidate contribution, while acknowledging that groups supporting only party might be expected due to the "partisan outlines of our politics") (attached to complaint).

E. Section 441c's Prohibition on Contributions is Unconstitutional Unless it is Read to Exempt Super PACs

The Commission has the discretion to read section 441c in a manner that is consistent with the Constitution by exempting contributions to independent expenditure-only committees.[79] For example, the words "committee" and "person" in section 441c can be read to include only candidate committees, party committees, leadership PACs, and political committees that contribute to those entities. This would preserve the meaning of the statutory text as it was understood before Super PACs existed. Moreover, it would not render any of the statutory language superfluous.[80] The Commission can and should exercise its discretion to construe section 441c to exclude independent expenditure-only committees.

III. Conclusion

Chevron Corporation made a contribution in October 2012 to the Congressional Leadership Fund, an independent expenditure-only committee that supports House Republican candidates. It was not a federal contractor at the time nor was it seeking to become one. The database upon which complainants rely to suggest that Chevron Corporation was a contractor contains and reflects numerous errors. It does not, however, provide a basis upon which to conclude that Chevron Corporation was a federal contractor when it made the contribution. As such, there is no factual support for the allegation that either Chevron Corporation or Chevron U.S.A. Inc. violated section 441c.

Even if the Commission were to determine that either Chevron Corporation or Chevron U.S.A. Inc. was a federal contractor at the time of the contribution, neither can be constitutionally prohibited from expending funds to support independent expenditures. Like section 441b, which "banned [corporations] from making independent expenditures,"[81] section 441c purports to ban corporations that are federal contractors from making independent

---

[79] *See, e.g., National Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981-82 (2005) (holding that an agency has the authority to interpret the statute it administers, and explaining that, "'[a]n initial agency interpretation is not instantly carved in stone. On the contrary, the agency . . . must consider varying interpretations and the wisdom of its policy on a continuing basis'" (quoting *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 863-64 (1984))).

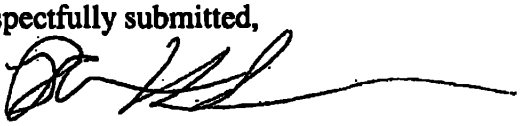
[80] *See, e.g., Stop This Insanity, Inc. Employee Leadership Fund v. FEC*, No. 12-1140(BAH), 2012 WL 5383581, *14 (D.D.C. Nov. 5, 2012) ("[T]he government's interest in 'deal[ing] with the reality or appearance of corruption inherent in a system permitting unlimited financial contributions,' is directly implicated when contributions are made to groups that in turn make direct contributions to candidates or political parties." (citations omitted)).

[81] *Citizens United*, 130 S. Ct. at 913.

expenditures.[82] Independent expenditures and contributions to independent expenditure-only committees, by definition, do not give rise to a threat of *quid pro quo* corruption,[83] which is the only remaining legitimate governmental interest that might support a ban on a domestic corporation such as Chevron Corporation from expending funds to support independent expenditures. This constitutional issue can be avoided if the Commission reads the prohibition in section 441c in light of case law and history to exclude its application to the specialized entities commonly referred to as "Super PACs."

For all of the foregoing reasons, Chevron Corporation and Chevron U.S.A. Inc. respectfully request that the Commission conclude there is no reason to believe that a violation of the FECA has occurred and dismiss this matter under review.

Respectfully submitted,



Robert K. Kelner
Robert D. Lenhard
Kevin R. Glandon
COVINGTON & BURLING LLP
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 662-6000

---

[82] *See* 2 U.S.C. § 441c; 11 C.F.R. § 115.2(a).

[83] *Citizens United*, 130 S. Ct. at 909 (holding that independent expenditures do not give rise to the threat of *quid pro quo* corruption); *SpeechNow*, 599 F.3d at 696 (extending this reasoning to contributions to independent expenditure-only committees).